Sherman Act, as an unreasonable restraint of trade.[13] While recognizing that a legal monopoly exists while the goods are in the hands of the maker, it is argued that it is against public policy to allow the monopoly to continue beyond the first sale. It is said that at the time of this sale the goods pass outside the monopoly, and that a system of contracts limiting the revending illegally restrains trade.[14] In view of the fact that a manufacturer might refuse to sell any goods at all, it is difficult to see how a control over the later sales can be more objectionable, as a restraint of trade, than the original monopoly. It would seem, then, unreasonable to arbitrarily limit the monopoly to the first sale. However, under this decision probably a similar system of contracts as to patented articles would be held illegal. The tendency of the courts, therefore, is to make effective control of the resale price of patented articles practically impossible.

EXTENSION OF THE FEDERAL POWER OVER INTERSTATE COMMERCE UNDER THE PURE FOOD AND DRUGS ACT. — The effect of the decision in the case of *McDermott* v. *State of Wisconsin*, 228 U. S. 115 on the extension of federal power under the Pure Food and Drugs Act is of more than passing importance. The act [1] provides that misbranded articles shall be contraband and subject "to be proceeded against and seized" while still "unloaded, unsold, or in their original and unbroken packages"; and by a decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, as empowered under the act,[2] a certain type of label was declared to be lawful for syrup mixtures.[3] Now a Wisconsin statute was passed declaring punishable the use of any label other than a certain described one. The defendant had on his shelves, unpacked from their original packages and ready for sale, cans of syrup mixtures with federal labels attached. These labels did not comply with the state statute, and the defendant, being prosecuted thereunder, raised the question of constitutionality of the state statute. The Supreme Court of the United States held that the use of any label in interstate commerce other than that ratified in the decision of the Secretaries, was unlawful, and that therefore the Wisconsin statute was unconstitutional, even in its application to goods not in their original packages. The court based its decision on the ground of the necessity for keeping the federal label on the packages even after the goods are taken from their original pack-

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[13] Dr. Miles Medical Co. *v.* Park & Sons, 220 U. S. 373, 31 Sup. Ct. 376. See 24 HARV. L. REV. 244, 680. The English view is opposed to this. See Elliman *v.* Carrington, [1901] 2 Ch. D. 275. An effort has been made to distiguish this case as not involving a system of contracts.

[14] Where the contracts are made by the manufacturer of ordinary chattels of commerce, it may be doubted whether the same result would be reached. Where other makers freely compete in the same kind of goods, it can hardly be said that there is a monopoly at any time except in so far as every manufacturer has a monopoly of the goods he makes. See Park *v.* Hartman, 153 Fed. 24, 42, 17 HARV. L. REV. 415.

[1] 34 Stat. at L. 768.

[2] *Supra*, 768.

[3] See 228 U. S. 127.

ages, in order to give the federal officers proper opportunity for the inspection necessary to the enforcement of the act.[4]

Although no absolute rule may be laid down, it is safe to say that a *bonâ fide* police regulation is not unconstitutional under the commerce clause if it does not directly regulate or obstruct interstate commerce,[5] or conflict with any federal statute.[6] Clearly apart from the Pure Food and Drugs Act the Wisconsin statute as applied to goods after they have been taken from their original packages does not, in the light of former decisions,[7] directly hinder or obstruct interstate commerce. Under the construction given by the court to the Pure Food and Drugs Act and to the decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, mentioned above, the Wisconsin statute does conflict with the federal act. It is submitted, nevertheless, that another construction is possible. The effect of the act in itself is merely to declare that misbranded and certain other articles shipped through interstate commerce are contraband. So, also, the decision of the Secretaries declaring a certain label to be lawful[8] can mean simply what it says, and not necessarily that it is the only lawful and proper label. For a state to require the setting out on the label of the contents of a package in more detail would not seem to conflict with the stipulations of the federal statute thus construed, if such a label as required was also a proper and correct brand. The federal act in its broad construction cuts deeply into the police power of the states. This was a power reserved to the states by the Constitution, and it seems only fair that, in so far as it is practicable, a state should be allowed to decide for itself what is detrimental and how it will protect itself.[9] As a practical matter also, local police regulations are far more efficient than federal laws, which can hardly fit all the different conditions existing in our wide expanse of territory.[10] For these reasons, in construing such a statute as the Pure Food and Drugs Act, it is submitted that a construction which will allow proper scope to the police power of a state is the one to be followed. On such a construction the Wisconsin statute as shown above would be no direct burden on interstate commerce, and instead of conflicting would be an aid to the

[4] Interstate commerce has usually been understood to cease when the goods are mixed with the general mass of intrastate goods. Taking goods out of their original packages has been used as a rough general test for determining when this happens. See Brown *v.* Maryland, 12 Wheat. (U. S.) 419; License Cases, 5 How. (U. S.) 504; Purity Extract and Tonic Co. *v.* Lynch, 226 U. S. 192; Leisy *v.* Hardin, 135 U. S. 100; Shollenberger *v.* Pennsylvania, 171 U. S. 1; Savage *v.* Jones, 225 U. S. 501. The decision of the court in the principal case clearly shows that the federal control may be extended indirectly beyond the original package line, but does not necessarily extend the actual limits of interstate commerce.

[5] Purity Extract and Tonic Co. *v.* Lynch, *supra*; Austin *v.* Tennessee, 179 U. S. 343; Savage *v.* Jones, *supra*.

[6] Southern Ry. Co. *v.* Reid, 222 U. S. 424; Northern Pacific R. Co. *v.* Washington, 222 U. S. 370; Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426.

[7] Purity Extract and Tonic Co. *v.* Lynch, *supra*; License Cases, *supra*; Austin *v.* Tennessee, *supra*.

[8] "We have given careful consideration to the labeling, . . . of thick viscous syrup . . . *In our opinion it is lawful* to label this syrup as corn syrup, and if there is added . . ., the mixture *in our judgment is not misbranded* if labeled corn syrup with cane flavor . . ."

[9] See 20 Case and Comment, 310.

[10] Lochner *v.* New York, 198 U. S. 45.

enforcement of the federal act, because the state, in enforcing its own law, would be enforcing the federal act also.

The decision, however, may perhaps be supported on another ground. To justify, as a police regulation, a restriction of liberty or the taking of private property without compensation, under the Fourteenth Amendment, the purpose of the statute must be to afford some reasonably necessary protection against dangers, frauds, vice, or oppression. It would seem arguable, at least until the goods were sold, that the federal act would afford as efficient protection against fraud as this Wisconsin statute.[11] If this is so, the Wisconsin statute would seem unnecessary, and would result in deprivation of property and abridgment of freedom without due process of law and therefore would be unconstitutional.

INCIDENTS OF PROCEDURE UNDER PENAL STATUTES. — The fear of oppression at the hands of the sovereign, and the odium attaching to criminal proceedings, together with the disadvantage under which the accused labors both as to counsel and as to his prejudicial position in the court room, collectively seem to be the bases of the common law and constitutional safeguards in criminal cases.[1] These immunities in favor of the accused have therefore logically no place in a proceeding to enforce a statute under the terms of which the penalty does not inure to the state;[2] for the right to punish and to pardon is then not in the sovereign but in the individual suing for the penalty.[3] The same seems true of *qui tam* actions, where the informer is entitled to part of the fine, since the state has divested itself of the right to remit the whole penalty.[4] These privileges, on the other hand, seem equally inapplicable under a statute providing for enforcement by means of a civil action. For it was the very form of a criminal prosecution which called the safeguards into requisition. In *United States* v. *Regan*, 203 Fed. 433 (C. C. A., Second Circ.), under a statute providing for the punishment of the importation of aliens by means of a civil action for the penalty, at the suit of the United States or an informer, the court held that proof beyond a reasonable doubt was necessary. Such a ruling would seem incorrect by the above reasoning. The court reached its result apparently because the act forbidden was called a misdemeanor by the statute. Now in a civil suit it is frequently necessary for the plaintiff to prove an act which is in itself a crime, but this does not necessarily require its proof beyond

[11] The Wisconsin statute says in substance that syrup mixtures containing more than seventy-five per cent glucose, shall be labelled "Glucose flavored with Sugar-cane Syrup . . .," and "shall have no other designation or brand."

[1] See 1 WHARTON, CRIMINAL EVIDENCE, 10 ed., § 1.

[2] Town of Partridge *v.* Snyder, 78 Ill. 519; United States *v.* Laescki, 29 Fed. 699; Phillips *v.* Bevans, 23 N. J. L. 373.

[3] Where the right of action is in a municipal corporation, the principle would seem to be the same. City of Greensburgh *v.* Corwin, 58 Ind. 518. But it should be observed that the language of a particular charter may render the enforcement of a municipal ordinance a criminal proceeding. In the matter of Querrero, 69 Cal. 88.

[4] United States *v.* Griswold, 30 Fed. 762; State *v.* Williams, 1 Nott & McC. (S. C.) 26.